

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
2 SENATE BILL 651

3 **49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009**

4
5
6
7
8
9
10 AN ACT

11 RELATING TO REAL PROPERTY; ENACTING THE MORTGAGE FAIR
12 FORECLOSURE ACT; PROVIDING PENALTIES.

13
14 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

15 Section 1. SHORT TITLE.--This act may be cited as the
16 "Mortgage Fair Foreclosure Act".

17 Section 2. LEGISLATIVE FINDINGS.--The legislature finds
18 it to be the public policy of New Mexico that homeowners should
19 be given reasonable notice of the fact of and basis for an
20 alleged default on their mortgage and the opportunity to pay
21 their home mortgages if they are deficient, and that lenders
22 will be benefitted when residential mortgage debtors cure their
23 defaults and return defaulted residential mortgage loans to
24 performing status.

25 Section 3. DEFINITIONS.--As used in the Mortgage Fair

.178322.6

underscored material = new
[bracketed material] = delete

1 Foreclosure Act:

2 A. "debtor" means a natural person shown on the
3 record of a mortgage lender as being obligated to pay the
4 obligation secured by that mortgage;

5 B. "lender" means a person that makes or holds a
6 residential mortgage and a person to which a mortgage is
7 assigned, but does not include the seller in a real estate
8 sales contract that is otherwise binding under New Mexico law;

9 C. "loss mitigation" means any process designed to
10 explore and pursue alternatives to foreclosure;

11 D. "mortgage" means a mortgage, security interest,
12 deed of trust or the like, but not a real estate sales contract
13 that is otherwise binding under New Mexico law, in which the
14 security is a residential property in New Mexico such as a
15 house, real property or condominium that is occupied, or is to
16 be occupied, by the debtor, who is a natural person, or a
17 member of the debtor's immediate family, as that person's
18 residence; and

19 E. "servicer" means a person that, whether for
20 compensation or gain from another or on its own behalf, engages
21 in the business of receiving any scheduled periodic payments
22 from a debtor pursuant to the terms of any mortgage loan,
23 including amounts for escrow accounts, and making the payments
24 of principal and interest and such other payments with respect
25 to the amounts received from the debtor as may be required

.178322.6

1 pursuant to the mortgage loan, the mortgage servicing loan
2 documents or the servicing contract with a lender.

3 Section 4. APPLICABILITY.--The Mortgage Fair Foreclosure
4 Act applies to all mortgages wherever made that have as their
5 security such a residence in New Mexico, provided that the real
6 property that is the subject of the mortgage shall not have
7 more than four dwelling units, one of which shall be, or is
8 planned to be, occupied by the debtor or a member of the
9 debtor's immediate family as the debtor's or family member's
10 residence at the time the mortgage is executed.

11 Section 5. WRITTEN NOTICE OF INTENT TO ACCELERATE LOAN OR
12 FORECLOSE.--

13 A. Upon a failure to perform any obligation of a
14 mortgage by a debtor and before any lender or servicer may
15 accelerate the maturity of a mortgage obligation and commence a
16 foreclosure or other legal action to take possession of the
17 property that is the subject of the mortgage, the lender or
18 servicer shall give the debtor written notice of such intention
19 at least thirty days in advance of such action.

20 B. Notice of intent to accelerate the maturity of a
21 mortgage obligation, commence a foreclosure or take any other
22 legal action to take possession of the property that is the
23 subject of the mortgage shall be in writing, and either served
24 personally on the debtor or sent to the debtor by registered or
25 certified United States mail, postage prepaid and return

.178322.6

1 receipt requested, at the debtor's last known address, and if
2 different, to the address of the property that is the subject
3 of the mortgage. If notice is accomplished by mail, notice
4 shall also be sent to any alternative address that the debtor
5 has provided to the lender or servicer. The notice is deemed
6 to have been effectuated on the date the notice is served
7 personally on the debtor or seven days following the date of
8 the notice.

9 C. The written notice required pursuant to
10 Subsection A of this section shall be printed in at least
11 twelve-point font, be printed in English and Spanish and
12 identify that the notice is being sent pursuant to the
13 requirements set forth in this section. The written notice
14 shall clearly and conspicuously state in a manner reasonably
15 calculated to apprise the debtor of the following:

16 (1) the property that is the subject of the
17 security instrument being foreclosed upon, the particular
18 obligation or real estate security interest being foreclosed
19 upon and the parties to any such obligation or interest;

20 (2) the nature of the default claimed;

21 (3) the right of the debtor to cure the
22 default as provided in Section 7 of the Mortgage Fair
23 Foreclosure Act;

24 (4) what performance, including the sum of
25 money, if any, required to cure the default as of the date

1 specified pursuant to Paragraph (6) of this subsection;

2 (5) the allocation of money due and owing to
 3 principal, interest, fees and any other applicable allocation,
 4 including a projection of the change in money due as a result
 5 of daily accrual during the thirty-day period set forth in
 6 Paragraph (6) of this subsection;

7 (6) the date by which the debtor shall cure
 8 the default to avoid initiation of foreclosure proceedings or
 9 the initiation of any other legal action to take possession of
 10 the residential property that is the subject of the mortgage,
 11 which date shall not be less than thirty days after the notice
 12 is effectuated, and the name, address and telephone number of a
 13 person to whom the payment or tender shall be made;

14 (7) the lender's right to take steps to
 15 terminate the debtor's ownership in the property by commencing
 16 a foreclosure suit in a court of competent jurisdiction, or by
 17 taking other legal action to take possession of the residential
 18 property that is the subject of the mortgage, if the debtor
 19 does not cure the default by the date specified pursuant to
 20 Paragraph (6) of this subsection;

21 (8) the right, if any, of the debtor to
 22 transfer the real property that is the subject of the mortgage
 23 to another person, subject to the security interest, which
 24 transferee shall have the right to cure the default as provided
 25 in the Mortgage Fair Foreclosure Act, subject to the mortgage

.178322.6

underscored material = new
 [bracketed material] = delete

1 documents;

2 (9) the debtor's right to seek counsel from an
3 attorney of the debtor's own choosing concerning the debtor's
4 mortgage default, and that, if the debtor is unable to obtain
5 an attorney, the debtor may contact the New Mexico bar
6 association or lawyer referral services in the county in which
7 the real property securing the mortgage loan is located, and
8 that if the debtor is unable to afford an attorney, the debtor
9 may contact the legal services programs in the county in which
10 the property is located;

11 (10) a listing of any loss mitigation
12 counselors certified by the federal department of housing and
13 urban development located in New Mexico to discuss feasible
14 loss mitigation options;

15 (11) the name and address of the lender and
16 the telephone number of a representative of the lender whom the
17 debtor may contact if the debtor disagrees with the assertion
18 that a default has occurred or the accuracy of the calculation
19 of the action or amount required to cure the default;

20 (12) the name, address and telephone number of
21 a person with the authority to modify or otherwise affect the
22 debtor's obligation under the subject security interest; and

23 (13) the debtor's right to redeem a foreclosed
24 mortgage obligation.

25 D. The notice of intent to foreclose required to be

.178322.6

1 provided pursuant to this section shall not be required if the
2 debtor has voluntarily surrendered in writing the real property
3 that is the subject of the mortgage that is in default.

4 E. The duty of the lender pursuant to this section
5 to serve notice of intent to foreclose is independent of any
6 other duty to give notice pursuant to common law, principles of
7 equity, state or federal statute, rule of court or any other
8 right or remedy the lender may have as a result of the failure
9 of a lender to give such notice.

10 F. Compliance with this section shall be set forth
11 in the pleadings of any legal action referred to in this
12 section. If the plaintiff in any complaint seeking foreclosure
13 of a mortgage alleges that the property subject to the mortgage
14 has been abandoned or voluntarily surrendered, the plaintiff
15 shall plead the specific facts upon which this allegation is
16 based.

17 Section 6. ACCOUNTING.--In conjunction with the notice
18 required pursuant to Subsection C of Section 5 of the Mortgage
19 Fair Foreclosure Act, the lender shall also provide the debtor
20 with an accounting of the loan obligation covering the
21 twelve-month period prior to the date of the alleged default.
22 The lender shall certify that the information contained in the
23 accounting is true and accurate to the best of its knowledge.
24 The accounting shall include, at a minimum, a history of all
25 payments made during the eighteen-month period prior to the

.178322.6

1 date of the alleged default and the lender's or servicer's
2 allocation of those payments to principal, interest and any
3 applicable fees.

4 Section 7. RIGHT TO CURE DEFAULT--PROCEDURE.--

5 A. Notwithstanding the provisions of any other law
6 to the contrary, as to any residential mortgage for which a
7 notice of intent to foreclose is required pursuant to Section 5
8 of the Mortgage Fair Foreclosure Act, whether or not such
9 required notice was in fact given, the debtor or anyone
10 authorized to act on the debtor's behalf shall have the right
11 at any time, up to the entry of final judgment by the court, to
12 cure the default or reinstate the mortgage by tendering the
13 amount or performance specified in Subsection B of this
14 section. The payment or tender shall be made to the person
15 designated in the notice pursuant to Paragraph (6) of
16 Subsection C of Section 5 of the Mortgage Fair Foreclosure Act.
17 The debtor may exercise the right to cure a default as to a
18 particular mortgage and reinstate the mortgage only once in a
19 one-hundred-eighty-day period; provided, however, that this
20 limitation shall not apply if the mortgage debtor cures a
21 default by the date specified in Paragraph (6) of Subsection C
22 of Section 5 of the Mortgage Fair Foreclosure Act. The one-
23 hundred-eighty-day time period shall run from the date of cure
24 and reinstatement.

25 B. To cure a default pursuant to this section, a

.178322.6

1 debtor shall:

2 (1) pay or tender to the person identified
 3 pursuant to Paragraph (6) of Subsection C of Section 5 of the
 4 Mortgage Fair Foreclosure Act, in the form of cash, cashier's
 5 check or certified check, all sums due and owing;

6 (2) perform any other obligation that the
 7 debtor would have been bound to perform in the absence of the
 8 default or the exercise of an acceleration clause, if any; and

9 (3) pay all contractual late charges, as
 10 provided for in the mortgage or other security instrument.

11 C. To cure a default pursuant to this section, a
 12 debtor shall not be required to pay any charge, fee or penalty
 13 attributable to the exercise of the right to cure a default as
 14 provided for in the Mortgage Fair Foreclosure Act.

15 D. Cure of a default reinstates the debtor to the
 16 same position as if the default had not occurred. It
 17 nullifies, as of the date of cure, any acceleration of any
 18 obligation under the mortgage or other security instrument
 19 arising from the default.

20 E. If a default is cured after the filing of a
 21 foreclosure action, the lender shall give written notice of the
 22 cure to the court. Upon such notice, the court shall dismiss
 23 the action without prejudice.

24 F. The right to cure a default pursuant to this
 25 section is independent of any right of redemption or any other

.178322.6

underscored material = new
 [bracketed material] = delete

1 right or remedy pursuant to common law, principles of equity,
2 state or federal statute or rule of court.

3 Section 8. PRE-LITIGATION OBLIGATIONS.--

4 A. Notwithstanding the provisions of any law to the
5 contrary, with respect to a residential mortgage for which a
6 notice of intent to foreclose is required pursuant to Section 5
7 of the Mortgage Fair Foreclosure Act, a person with authority
8 to modify or otherwise affect the debtor's obligation pursuant
9 to the subject security interest identified pursuant to
10 Paragraph (12) of Subsection C of Section 5 of the Mortgage
11 Fair Foreclosure Act shall be required to participate in good
12 faith in loss mitigation with the debtor prior to the
13 commencement of any foreclosure proceeding.

14 B. Any loss mitigation conducted pursuant to
15 Subsection A of this section shall include the participation of
16 a counselor certified by the federal department of housing and
17 urban development, if available, to assist the parties in
18 identifying options to be considered for returning the loan to
19 performing status or otherwise avoiding foreclosure.

20 C. The loss mitigation required pursuant to
21 Subsection A of this section shall afford the debtor an
22 opportunity to pursue a variety of alternatives to foreclosure,
23 consistent with the debtor's current financial circumstances
24 and willingness and ability to pursue such alternatives. These
25 alternatives to foreclosure may include:

.178322.6

underscored material = new
[bracketed material] = delete

1 (1) reinstatement of the loan and dismissal of
 2 the foreclosure action upon the debtor's payment of applicable
 3 fees and demonstration that the debtor can bring the loan
 4 current;

5 (2) a repayment plan whereby the debtor agrees
 6 to resume making monthly payments, plus a portion of the past
 7 due payments each month, until the loan is brought current;

8 (3) a forbearance plan that may include one or
 9 more of the following features:

10 (a) suspension or reduction of payments
 11 for a period sufficient to allow the debtor to recover from the
 12 cause of default;

13 (b) a period during which the debtor is
 14 only required to make the regular monthly mortgage payment
 15 before beginning to repay the arrearage;

16 (c) a repayment period of at least six
 17 months; or

18 (d) allowing reasonable foreclosure
 19 costs and late fees accrued prior to the execution of the
 20 forbearance agreement to be included as part of the repayment
 21 schedule;

22 (4) an extension agreement whereby the debtor
 23 pays a portion of the amount of the total arrearage, and the
 24 remaining portion of the arrearage amount is added to the end
 25 of the loan;

.178322.6

underscored material = new
 [bracketed material] = delete

1 (5) a loan modification plan that would
2 permanently change one or more terms of the defaulted loan
3 obligation, including:

4 (a) extending the amortization period of
5 the loan;

6 (b) converting an adjustable rate
7 mortgage into a fixed-rate mortgage;

8 (c) reducing the mortgage interest rate;
9 or

10 (d) adding missed payments to the
11 existing loan balance;

12 (6) a reasonable refinancing period of no
13 fewer than sixty days during which the lender agrees not to
14 pursue foreclosure and gives the debtor an opportunity to seek
15 refinancing of the loan obligation with a third-party lender;

16 (7) a principal reduction agreement in those
17 cases in which the debtor's loan obligation has a negative
18 amortization;

19 (8) a principal forbearance agreement;

20 (9) a mortgage loan assumption agreement
21 whereby a qualified third-party individual or entity can assume
22 the loan's payment obligation and the lender waives any
23 applicable "due on transfer" provision;

24 (10) an agreement by the debtor to execute a
25 deed in lieu of foreclosure in exchange for the lender

.178322.6

1 canceling the debt owed on the loan;

2 (11) a short sale; or

3 (12) a voluntary surrender of the home in
4 exchange for cash consideration.

5 D. The obligation to participate in loss mitigation
6 otherwise required pursuant to this section may be terminated
7 by the lender when the lender has pursued loss mitigation
8 efforts with the debtor and has determined, after a reasonable
9 period of time, that loss mitigation options are not feasible
10 in light of the totality of the circumstances.

11 E. A lender terminating loss mitigation pursuant to
12 Subsection D of this section shall:

13 (1) document all efforts to inform the debtor
14 and to evaluate loss mitigation opportunities; and

15 (2) within ten days of terminating loss
16 mitigation, provide to the debtor a written statement setting
17 forth the reasons for the alleged non-feasibility of loss
18 mitigation efforts.

19 Section 9. SETTLEMENT CONFERENCE--MEDIATION--PROCEDURE.--

20 A. In the initial pleading filed by a lender, the
21 lender shall certify that it has complied with Section 8 of the
22 Mortgage Fair Foreclosure Act and specify the actions taken to
23 comply with those obligations prior to the filing of the
24 action.

25 B. At any time after the filing of any responsive

.178322.6

1 pleading, the court may on its own motion or for good cause
2 shown, enter an order directing the parties to participate in
3 alternative dispute resolution as provided in Subsection C of
4 this section.

5 C. An alternative dispute resolution process shall
6 be conducted at no direct or collateral cost to the debtor.
7 All parties shall be required to participate, and a designated
8 representative of each party with final decision-making
9 authority shall participate. The alternative dispute
10 resolution process may include:

11 (1) loss mitigation through a loss mitigation
12 agency certified by the federal department of housing and urban
13 development;

14 (2) a court-supervised settlement conference,
15 a settlement conference with a court-appointed special master
16 or a court-annexed mediation process; or

17 (3) the parties agreeing to private mediation
18 with a mutually agreed-upon independent, neutral mediator.

19 Section 10. VIOLATIONS--SANCTIONS.--If a court finds that
20 either party failed to negotiate in good faith during loss
21 mitigation or alternative dispute resolution, or that there has
22 been a material violation of any provision of the Mortgage Fair
23 Foreclosure Act by the lender, the court may in its discretion
24 dismiss the action, award sanctions or assess attorney fees and
25 costs.

.178322.6

1 Section 11. DEFICIENCY JUDGMENTS.--

2 A. The court may, in the exercise of its discretion
 3 and for good cause shown, limit or altogether prohibit the
 4 availability of any deficiency judgment against a debtor who
 5 has occupied the real property that is the subject of the
 6 purchase-money mortgage obligation as the debtor's primary
 7 residence, provided that the debtor has occupied the home as
 8 the debtor's primary residence for no fewer than one hundred
 9 twenty days prior to the initiation of the foreclosure action.

10 B. The court may find good cause for limiting or
 11 prohibiting the availability of a deficiency judgment against a
 12 qualifying debtor pursuant to Subsection A of this section.

13 Good cause may include a finding:

14 (1) that the debtor was locked into a
 15 predatory mortgage product or other nontraditional mortgage
 16 loan obligation; or

17 (2) that the debtor's financial circumstances
 18 are such that the debtor is not reasonably capable of
 19 satisfying a deficiency judgment.

20 Section 12. SEVERABILITY.--If any part or application of
 21 the Mortgage Fair Foreclosure Act is held invalid, the
 22 remainder or its application to other situations or persons
 23 shall not be affected.

24 Section 13. APPLICABILITY.--The provisions of this act
 25 apply to an action to foreclose on a mortgage, including any

.178322.6

underscored material = new
 [bracketed material] = delete

1 required notice, taken on or after July 1, 2009.

2 Section 14. EFFECTIVE DATE.--The effective date of the
3 provisions of this act is July 1, 2009.

4 - 16 -

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

underscoring = new
~~[bracketed material]~~ = delete